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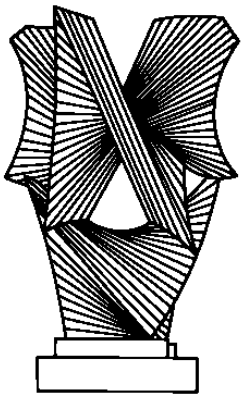

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Legislating *Chevron*

Elizabeth Garrett[*]

One of the most significant administrative law cases, *Chevron v. Natural Resources Defense Council*,[1] is routinely referred to as "the counter-*Marbury*."[2] The reference suggests that *Chevron*'s command to courts to defer to certain reasonable agency interpretations of statutes is superficially an uneasy fit with the declaration in *Marbury v. Madison* that "[i]t is emphatically the province and the duty of the judicial department to say what the law is."[3] According to the consensus view, *Chevron* deference is consistent with *Marbury*, as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws.[4] In saying what the law is, the courts determine that the law demands deference to the agency's decision. As Henry Monaghan wrote before *Chevron*: "A statement that judicial deference is mandated to an administrative 'interpretation' of a statute is more appropriately understood as a judicial conclusion that some substantive law-making

[*] Professor of Law, University of Chicago; Visiting Professor of Law, University of Southern California. I appreciate very helpful comments from Rachel Barkow, Jody Freeman, Andrei Marmor, Eric Posner, Cass Sunstein, and Adrian Vermeule, and conversations with Linda Cohen, Barry Friedman, Dennis Hutchinson, and Jim Rossi.

[1] 467 U.S. 837 (1984).

[2] For perhaps the first such reference, see Cass Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2075 (1990). See also Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 Wm. & Mary L. Rev. 1105, 1108 (2001) (stating that *Chevron* has "taken on canonical status as the 'counter-*Marbury*' for the administrative state").

[3] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[4] See, e.g., Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 Geo. L.J. 833, 863 (2001); David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 215 (2002); Ronald J. Krotoszynski, *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 Admin. L. Rev. 735, 746-47 (2002). A very few scholars resist the notion that congressional delegation can solve the *Marbury* problem apparently caused when courts are not the primary interpreters of the law. See, e.g., Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 477 (1989). See also Louis L. Jaffe, Judicial Control of Administrative Action 563 (1965) (twenty years before *Chevron*, discussing judicial deference to agency interpretations and noting that the propriety of the practice "assumes, of course, that under our system of law an agency may not only apply rules, but may make them"). This symposium will no doubt shed new light on this debate.

authority has been conferred upon the agency."[5] His use of the passive tense here could obscure one important part of his formulation: It is Congress that has conferred such lawmaking power on the agencies; thus, judicial deference stems from an understanding that it is emphatically the province and duty of the legislative department to determine whether agencies or the courts should determine policy by interpreting statutes.

Congressional delegation is not important just to reconcile modern administrative law with *Marbury*; it is also the reason provided by courts to justify strong deference to agency interpretations of law. *Chevron* held that

> [i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. … Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[6]

Although it cut back on the scope of *Chevron*, *United States v. Mead*[7] underscored that strong judicial deference is a product of either an explicit or implicit delegation by Congress.[8] In the first part of this article, I will discuss the various ways courts have reached decisions about the delegation issue and provide a brief assessment of them.

In the end, none of the judicial methods to determine whether Congress actually delegated law-interpreting authority to agencies can satisfactorily achieve that objective. Without explicit congressional direction regarding which institution, courts or agencies, should have the primary role in interpreting statutes, the institutional choice is necessarily made by courts when they decide cases that require such interpretation. Although they tend to justify their decisions by reference to congressional intent, in the absence of such intent or without effective methods to ascertain it, the judicial branch decides whether or not to defer to agencies based on judges' views of policy, institutional competence, and other factors. Some scholars have argued that, if the decision has been effectively left to the courts, judges should devise and consistently apply a general rule of construction of

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[5] Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6 (1983). See also John H. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 621-22, 627 (1996) (using Monaghan's analysis to reconcile *Marbury* and *Chevron*).
[6] *Chevron*, 467 U.S. at 843-44.
[7] 533 U.S. 218 (2001).
[8] *Mead*, 533 U.S. at 229.

regulatory statutes based on an explicit consideration of the institutional capacities of the courts and agencies.[9] Recourse to congressional intent is inevitably unavailing, the argument goes, so courts should more transparently base their approach on other factors.

My project in this article is not to argue in favor of a particular rule of judicial review but rather to focus on a feature common to all of them. Whether courts search for some direction from Congress or whether they allocate interpretive authority based on other factors, all the methods of judicial review provide that a clear congressional instruction overrides any judicial rule. As Thomas Merrill and Kristin Hickman explain:

> The conclusion that *Chevron* rests on an implied delegation from Congress … has important implications for *Chevron*'s domain: It means that Congress has ultimate authority over the scope of the *Chevron* doctrine, and that courts should attend carefully to the signals Congress sends about its interpretative wishes.[10]

Similarly, those who argue in favor of a consistently-applied interpretive regime based on institutional, nonintentionalist grounds anticipate that "clear instructions of Congress"[11] can vary the effect of the default. Why hasn't Congress more often taken advantage of this power to signal its intentions clearly? Does its silence allow us to assume that Congress virtually always agrees with the judicial approach in these cases? Are the procedural hurdles faced by Congress in passing legislation with clear directives to courts and agencies so formidable that the opt-out features in all the judicial approaches are illusory?[12] Are we sufficiently confident that Congress has a realistic opportunity to communicate clearly when it wishes to depart from whatever approach the courts are currently applying? If the opt-out feature of all these methods of judicial review is not a real option for Congress, then the emphasis put on the possibility of congressional involvement in justifying an approach or in constructing a default rule is misplaced at best, and serves as deceptive and confusing window-dressing at worst.

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[9] See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. ___ (2003) (forthcoming) (arguing in favor of an institutional approach).

[10] Thomas W. Merrill & Kristin E. Hickman, supra note 4, at 836. See also Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L . Rev. 807, 823 (2002) (explaining that "*Christiansen* [*v. Harris County*, 529 U.S. 576 (2000)] and *Mead* make it clear that Congress has the authority to turn *Chevron* deference on and off").

[11] Cass R. Sunstein & Adrian Vermeule, supra note 9, at ___.

[12] See Mark Tushnet, *Alternative Forms of Judicial Review* 101 Mich. L. Rev. ___, [11] (2003) (noting that what he calls "provisional review" may not be "provisional in practice" if Congress cannot overcome hurdles to legislating different instructions).

To the extent that anyone mentions the possibility of greater congressional involvement,[13] it is quickly dismissed because Congress seldom provides explicit instructions allocating this sort of policymaking authority and because it is seen as unrealistic to expect that Congress will improve its performance.[14] In the second part of this article, I describe a mechanism that could provide Congress an opportunity to provide explicit instructions about law-interpreting authority. Low expectations for congressional performance stem in part from a failure to think creatively about the kinds of legislative vehicles available to Congress and about internal rules that can structure its deliberation. Past discussions assume that Congress could signal its delegation decision in one of two ways. First, Congress could pass a broad statute that would allocate the law-interpreting function either to agencies or courts with respect to all statutes unless subsequent laws vary the default rule. Arguably, Section 706 of the Administrative Procedure Act[15] is a broad statement delegating that authority to courts, contrary to the rule adopted in *Chevron*.[16] Alternatively, Congress could make the decision with respect to each statute, perhaps also amending previously enacted statutes that are silent on the issue.

I suggest that Congress has another way to communicate its choice among institutions. In statutes that periodically re-authorize administrative agencies and large federal programs or that annually appropriate funds to agencies, Congress could determine on an agency-by-agency basis whether to delegate the power to make policy through statutory interpretation with respect to all statutes that the agency administers, or

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[13] Merrill briefly discusses this option, considering both the possibility that Congress might pass a broad statute or that it would provide instructions statute-by-statute. See Thomas W. Merrill, supra note 10, at 824-25.

[14] See, e.g., David J. Barron & Elena Kagan, supra note 4, at 203, 227.

[15] 5 U.S.C. § 706.

[16] See, e.g., Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power Over Statutory Interpretation*, 96 Nw. U. L. Rev. 1239, 1249 (2002) (reading section 706 as an express congressional affirmation of "judicial power over law declaration"). But see Thomas W. Merrill & Kristin E. Hickman, supra note 4, at 871 ("*Chevron* deference is consistent with the APA's direction to courts to decide all relevant questions of law because virtually all the statutes that reflect an implicit delegation of interpretational authority either postdate the APA or have been reenacted since its passage. … In effect, every time Congress has made an implied delegation to an administrative agency, it has silently amended section 706 of the APA."). Michael Herz disputes Merrill and Hickman's suggested reading of section 706 and *Chevron*, noting that the APA states that no subsequent statute can supersede or modify the APA unless it does so expressly. See Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 Cardozo L. Rev. 1663, 1664-65 (1992) (citing section 559 of the APA).

with respect to some subset of decisions. Congress could define that subset using a procedural metric, as the Court appears to do in *Mead,* or on some other basis. The congressional decision could be based on the variety of factors, including those identified by courts and others as relevant to whether a delegation of law-interpreting authority to agencies makes sense. In particular, Congress could assess the performance of each agency and judge whether it is the best entity to make the policy decisions inherent in interpreting vague or ambiguous statutory language. Congress would also have the ability to revise its determination over time as it re-assessed agency performance.

This proposal is designed to take seriously the feature of judicial review of regulatory statutes that contemplates the possibility of an active role for Congress. There are two decisions in the context of regulatory policy that require choices between institutions. First, either Congress or the judiciary has to decide which governance institution has the primary responsibility for shaping regulatory policy through statutory interpretation. This decision implicates the design and authority of administrative agencies; it is a decision that determines the contours of the policymaking process over time. In part because of the tension between modern regulatory precedents and *Marbury*[17] and in part because the decision to vest an institution with law-interpreting authority is such a vital aspect of policymaking, the various proposals for judicial review provide Congress the first opportunity to make the choice of interpreters. But if Congress does not fill this role for some reason, the courts must decide whether to interpret the statute themselves or defer to reasonable agency views. Which institution is the primary interpreter is thus the second institutional choice decision, and it can be made on various grounds, all of which are better suited for consideration by Congress but which are not impossible for courts to assess and apply.

In this complex interplay among the various government players, we could be more confident that Congress actually has the capacity to intervene occasionally, or even frequently, if a procedural framework made the issue more salient to lawmakers when they decided other similar issues of regulatory design. To put it more bluntly, if we want to pay more than lip service to the notion that Congress might be a vital player in

[17] See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 513-14 (discussing the tension between modern administrative law approaches and *Marbury*).

decisions to allocate interpretive authority to other institutions, we should think seriously about procedures that could empower legislators in this realm. If we decide that actual congressional involvement will never or only rarely occur, even with new action-prompting procedures, then our attention would be better focused on developing judicial strategies to allocate interpretive authority without reference to congressional intentions.

I. Discovering—or Constructing—Congressional Intent to Delegate

The traditional challenge presented by the interaction of *Chevron* and *Marbury* is to determine in a particular case whether Congress actually has delegated law-interpreting power to an agency. There are occasional explicit delegations, just as there are sometimes specific statutory provisions revealing that Congress has determined that courts should interpret statutory terms without any enhanced attention to the agency's views.[18] Such explicit instructions may have once occurred more frequently than they do now. Thomas Merrill and Kathryn Tongue Watts reveal that in the first half of the twentieth century, Congress followed a drafting convention to signal that it intended to authorize agencies to act with the force of law, a power that included the ability to interpret ambiguous language and fill statutory gaps. Pursuant to this convention, when Congress delegated to an agency the authority to adopt rules and regulations with a specific provision authorizing it to impose sanctions for violations of such rules, Merrill and Watts argue that Congress intended agencies to act with "force of law."[19] The courts failed to pick up on this coded signal,[20] but the congressional convention may demonstrate that the legislature has sometimes considered the delegation issue and reached a conclusion, albeit one cryptically conveyed.

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[18] For cases dealing with explicit delegations to agencies, see United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1981); Herweg v. Ray, 455 U.S. 265, 274-75 (1981); Rowan Cos. v. United States, 452 U.S. 247, 253 (1981); Batterton v. Francis, 432 U.S. 416, 425 (1976); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 613-14 (1944). Barron and Kagan provide an example of Congress' explicitly instructing courts to determine interpretive issues "without unequal deference" to the agency view. See David J. Barron & Elena Kagan, supra note 4, at 216 n.58 (citing Gramm-Leach-Bliley Act, enacted in 1999).

[19] See Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467, 503-26 (2002).

[20] Id. at 475.

Nonetheless, express congressional instructions are rare, so in most cases a court must work to determine if there has been an implicit delegation. The cases reveal various approaches to this question, some that are more rule-like in nature, and others that rely on more open-textured standards. Courts have moved between the two approaches, currently resting somewhere in the middle. Moreover, even when courts have adopted a relatively bright-line rule apparently requiring deference to agencies in many circumstances, in practice judges have often resisted deferring to agency interpretations, deciding instead that the statutory language clearly compels only one result. In the absence of explicit congressional communication, any quest for congressional intent may obscure what is actually occurring: the judiciary is determining whether to defer to an agency interpretation without any guidance, implicit or otherwise, from Congress.

Although courts deferred to some agency interpretations of statutes before *Chevron*,[21] the basis for deference was not entirely clear and often seemed to rest on the agency's power to persuade the court that its interpretation, a product of its expertise, was the best understanding of vague or ambiguous language. *Chevron* can be understood as adopting a rule-like presumption that statutory silence or ambiguity should be read as an implicit delegation to agencies. The rule-like quality of *Chevron* was in part a reaction to the complex, multifactor approach to judicial deference used in the pre-*Chevron* era.[22] By providing a clear default rule that all cases of statutory ambiguity would be understood as a delegation to the agency to determine the meaning of the text, *Chevron* attempted to provide certainty and predictability for Congress, agencies and the regulated. The most enthusiastic proponent of *Chevron* as an across-the-board presumption, Justice Scalia, did not argue that it would capture actual congressional intent in many, or even most cases.[23] Indeed, as a textualist, Scalia is not particularly concerned with congressional intent in any context, expressing strong doubts that it is a coherent concept.[24] Instead, he

[21] See, e.g., NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). See also id. at 130 (at least suggesting that part of the reason for deference to the Board should be whether Congress "entrusted" the relevant decision to the agency).
[22] See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. Pa. L. Rev. 549, 562-67 (1985) (discussing factors used).
[23] See, e.g., Antonin Scalia, supra note 17, at 517. See also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 406, 445 (1989) ("An ambiguity is simply not a delegation of law-interpreting power. *Chevron* confuses the two.").
[24] See, e.g., Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 16-18 (1997).

maintained that "any rule adopted in this field merely represents a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate."[25]

The connection between *Chevron*'s presumption and actual congressional wishes is further undermined because the presumption has been applied to all regulatory statutes, not just those passed after the Court changed its approach from a multifactor analysis to a strong presumption. For statutes enacted before 1984, including the Clean Air Act provision at issue in *Chevron*, Congress could not be presumed to have relied on the default rule and therefore used ambiguity to signal its delegation of law-interpreting authority to agencies. Notwithstanding the lack of connection between the presumption and an actual congressional intent to delegate in many contexts, proponents argue that the rule allows for certainty in the future. If the rule is applied consistently, Congress can draft statutes in reliance on the default regime.[26] Thus, if Congress is silent about which institution has the primary responsibility for interpreting unclear statutory text, the legislature can be fairly understood as intending that agencies to fulfill that role. In addition, an across-the-board presumption offers the promise of reducing judicial decision costs. In theory, a bright-line rule that ambiguity or silence results in deference, absent congressional instructions to the contrary, is easy for judges to apply, particularly compared to a multifactor standard. Finally, use of the rule has been justified because any errors (measured against the baseline of what Congress intended) occur in favor of policymaking by a more democratically accountable institution, the executive branch, rather than by the insulated, unelected and life-tenured judicial branch.[27]

Chevron's rule-like quality has caused substantial unease for some judges and scholars, however, largely because of the doctrinal importance of congressional

[25] Antonin Scalia, supra note 17, at 517. See also *Mead*, 533 U.S. at 313 (Scalia, dissenting) (arguing that the principle of *Chevron* is "rooted in a legal presumption of congressional intent, important to the division of powers" between the branches of government).

[26] See Antonin Scalia, supra note 17, at 517 (suggesting that for statutes enacted after the adoption of the *Chevron* presumption, congressional silence might fairly be read as a delegation to an agency to provide meaning for vague or ambiguous terms).

[27] See, e.g., John F. Manning, supra note 5, at 627 ("*Chevron* adopts a background presumption that reconciles now firmly established conceptions of delegation with constitutional structure. It is more consistent with the assumptions of our constitutional system to vest discretion in more expert, representative, and accountable administrative agencies.").

delegation.[28] For many, the key question remained whether *Chevron* led to deference only, or even mainly, in cases where Congress actually delegated interpretive power to the agencies, or whether the rule was over-inclusive, requiring judicial deference even in cases where Congress had no intent or would have preferred a more aggressive judicial stance.[29] Moreover, in practice, *Chevron* has not provided a certain background regime against which Congress can act, a factor which may undermine any legislative will to provide express directives. The scope of *Chevron* is unclear,[30] and judges can avoid deferring to the agency interpretation if they find that statutory meaning is clear and unambiguous. By aggressively employing methods of statutory construction, courts decide cases at Step One of *Chevron*, thereby saying what the law is in the traditional sense and avoiding deference to reasonable agency understandings that the judges do not share.[31] Scalia acknowledged that one reason he supports *Chevron* as an across-the-board presumption is that his method of interpretation allows him to resolve many cases at Step One and to avoid the distasteful prospect of accepting an agency view with which he disagrees.[32] In addition, at Step Two a judge can avoid deferring to arguably reasonable interpretations by finding conflicts between the agency's policy decision and the judge's reading of the Act's purposes or goals.[33]

Several commentators have observed, after conducting various studies of the case law, that the effect of *Chevron* on judicial outcomes has not been as significant as one might have expected, although many found some increased level of judicial deference to

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[28] A rule like *Chevron*'s may be persuasively defended on grounds other than congressional delegation, a possibility I will discuss further infra, text at notes 68 through 71.

[29] See, e.g., Cynthia R. Farina, supra note 4, at 470-71.

[30] Steven Croley, *Scope of* Chevron, available online at http://www.abanet.org/adminlaw/apa/chevronscopejuly.doc (5th Draft July 2001). Merrill observed recently that the *Chevron* rule has elements of a more open-textured standard, undermining the predictability that it promises, although it is more rule-like than the judicial approach before 1984 and than the one adopted in *Mead.* See Thomas W. Merrill, supra note 10, at 808-09, 818.

[31] See Elizabeth Garrett, *Step One of* Chevron v. National Resources Defense Council, paper prepared for the Scope of Judicial Review portion of the Project on the Administrative Procedure Act, ABA's Administrative Law and Regulatory Practice Section, Third Revised Draft June 2001 with Supplementary Material added February 2003 (assessing judicial practice applying Step One of *Chevron*).

[32] See Antonin Scalia, supra note 17, at 521.

[33] M. Elizabeth Magill, *Step Two of* Chevron v. Natural Resources Defense Council, available online at http://www.abanet.org/adminlaw/apa/abachevron1.doc (4th Draft July 2001). Levin has argued convincingly that many of these cases are really Step One cases although the statutory interpretation by the court is done when assessing the reasonableness of the agency's interpretation. He terms such cases "belatedly discovered clean meaning" cases. See Ronald M. Levin, *The Anatomy of* Chevron*: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1283-84 (1997).

agency interpretations.[34] If Congress and interest groups are uncertain about the application of the judicial rule, crafting a legislative response is more difficult. Uncertainty about how *Chevron* will be applied has been exacerbated by uncertainty caused by the frequent shifts in the judicially-constructed background rule. It has never been entirely clear if all the justices shared Scalia's view that *Chevron* operated as an across-the-board presumption, for example, and the majority opinion in *Mead* rejects such an understanding, claiming it an inaccurate portrayal of judicial practice.[35]

Given the doctrinally pivotal role of congressional delegations in legitimizing deferential judicial review, some have advocated that the courts work to discern in each case whether Congress intended, or would have intended, that the agency interpret unclear statutory language. Writing a few years after *Chevron*, then-Judge Breyer agreed with Scalia that congressional intent to delegate in these cases is a "kind of legal fiction" in that it is often constructed by courts without any explicit directive from the legislature.[36] Breyer argued that courts should work to find implicit congressional intent by analyzing what a reasonable legislator would have intended with regard to the delegation issue, in light of all the practical circumstances surrounding the particular enactment. In other words, to reduce errors in the judicial determination of whether Congress wanted or would have wanted to delegate law-interpreting powers to an agency, courts should employ a multifactor approach reminiscent of the pre-*Chevron* analysis.[37] But this approach is not wholly satisfactory for those pursuing an intentionalist course, either. The use of such a standard imposes high decision costs on the judiciary, and even if judges use such an approach in a sophisticated manner, they may still misjudge

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[34] Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (1990); Linda R. Cohen & Matthew L. Spitzer, *Solving the* Chevron *Puzzle*, 57 L. & Contemp. Probs. 65 (1994); Aaron P. Avila, *Application of the Chevron Doctrine in the D.C. Circuit*, 8 N.Y.U. Env'l L.J. 398 (2000) (all finding some effect on deference attributable to *Chevron*). Compare with See Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969, 970 (1992) (finding no "discernible relationship" between *Chevron* and greater deference and also considering the role of textualism during this period). All these findings are somewhat unsatisfying, and more suggestive than conclusive, because of limitations in the data. For example, after the adoption of a new approach became clear to litigants, the mix of cases reaching courts shifted as those who lost before agencies challenged only the decisions that they believed likely to be overturned. See also Peter H. Schuck & E. Donald Elliott, supra, at 995-96, 1060-61 (discussing limitations in data and study design but concluding that the analysis nonetheless shed light on important questions).

[35] *Mead*, 533 U.S. at 237-38.

[36] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

[37] Id. at 370-73. See also Cynthia R. Farina, supra note 4, at 528 (acknowledging difficulty for courts of a multifactor and nuanced approach but arguing that it is constitutionally compelled).

whether Congress intended, or would have intended, to delegate law interpretation to the agencies.

Recently, the Court has tried to resolve the disagreement by adopting a sort of middle ground. In *Mead*, the Court articulated a standard of judicial review that has both rule-like and standard-like components. The objective of the new approach is the same as the objective articulated in *Chevron*: to discover Congress' intent as to which institution—courts or agencies—should make policy by interpreting ambiguous or vague statutory language.[38] *Mead* holds that deference is appropriate when "Congress would expect the agency to be able to speak with the force of law when it addressed ambiguity in the statute or fills a space in the enacted law."[39] To reach a conclusion that an agency has the power to regulate with the force of law, *Mead* appears to allow judges and agencies to rely on a safe harbor, holding that "it is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[40] Thus, when an agency promulgates its statutory interpretation as part of notice-and-comment rulemaking, formal adjudication, or formal rulemaking, courts should defer to reasonable agency interpretations of ambiguous text because they should infer that Congress has delegated that authority to agencies when it accorded them the power to act through such procedures.

If the choice of format entirely determined the level of deference and controlled the finding of implicit congressional delegations, *Mead*'s formulation would have the virtues of a relatively predictable rule, albeit one with a narrower scope than *Chevron*'s broad presumption. But the Court went on to say that "the want of that procedure does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[41] Thus,

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[38] See Thomas W. Merrill & Kathryn Tongue Watts, supra note 19, at 479 (noting that *Mead* court "made clear that *Chevron* deference is grounded in a congressional intent to delegate primary interpretive authority to the agency").
[39] *Mead*, 544 U.S. at 229.
[40] *Mead*, 533 U.S. at 230. Merrill and Watts argue that the agency's use of such procedures is itself not sufficient to allow a conclusion that Congress intended the agency to have the power to act with force of law. The determination of Congress' intent should be a separate inquiry from the question whether the agency then used the procedures necessary to promulgate a regulation with legislative force. See Thomas W. Merrill & Kathryn Tongue Watts, supra note 19, at 477-81.
[41] *Mead*, 533 U.S. at 231.

circumstances other than the formality of procedures authorized by Congress can give rise to deference because of delegation, but *Mead* provides little guidance about what those circumstances might be.[42] In general, they would be factors suggesting that Congress intended the agency to act with force of law, an inference easily drawn, the Court says, when Congress allows agencies to use certain procedures to regulate, but also possible in other unspecified circumstances.

To the extent that *Mead* posits a general rule to discern implicit congressional intent, the link between the procedure authorized and the amount of law-interpreting authority delegated is not immediately clear. As Ronald Levin has observed, "If the notion that Congress regularly contemplates *Chevron* deference in passing regulatory legislation is a fiction, as it seems widely agreed, surely the notion that Congress regularly makes decisions about whether a *given procedural format* should trigger *Chevron* deference is even more of a fiction."[43] David Barron and Elena Kagan similarly argue that in some cases Congress may want courts to exercise independent and relatively aggressive judicial review of agency interpretation of statutes even when the interpretation is provided through formal procedures or notice-and-comment rulemaking. Conversely, in some cases Congress may want "to give interpretive authority to an agency separate and apart from the power to issue rules or orders with independent legal effect on parties."[44] The point is that *Mead*'s safe harbor is not necessarily an accurate proxy for congressional delegation to agencies, although perhaps it is a tighter fit than the broader *Chevron* rule because it affects a smaller subset of agency decisions and considers one factor that is surely relevant to discovering actual intent. But by raising the procedural issue to a safe harbor, *Mead* sacrifices the objective of getting the delegation question right in favor of certainty and predictability—a goal that it then undermines by suggesting vaguely that other circumstances might also dictate substantial judicial deference.[45] Supreme Court opinions since *Mead* can be read to suggest that the Court is

[42] For an indictment of *Mead*'s hybrid approach, see Adrian Vermeule, Mead *in the Trenches*, __ Geo. Wash. L. Rev. __ (forthcoming 2003).
[43] Ronald M. Levin, Mead *and the Prospective Exercise of Discretion*, 54 Admin. L. Rev. 771, 792 (2002).
[44] David J. Barron & Elena Kagan, supra note 4, at 218-19.
[45] Some judicial deference may be appropriate even for interpretations by agencies that are not promulgated through formal procedures and that do not exhibit any other features that would allow courts to infer that Congress delegated the law-interpreting function to the agency. But in these cases, deference is due only

returning to a multifactor approach, assessing a variety of considerations relevant to either discovering an implicit congressional delegation or determining what a reasonable legislature would have done in a particular case.[46]

The challenges posed for courts of a multifactor standard are substantial because so many factors might be relevant. As Barron and Kagan observe: "Congress's view on deference (were Congress to consider the matter) likely would hinge on numerous case-specific and agency-specific variables, not readily susceptible to judicial understanding or analysis."[47] Various relevant factors can be discerned from the case law and other discussions of the formulation of regulatory policy. Any judicial attempt to discern congressional intent or to conclude what the legislature might intend if members thought about the issue could require consideration of at least four types of issues, some of which have not played a role in judicial deliberations in the past. First, the kind of question arguably delegated to the agency is relevant in the inquiry. Whether Congress has delegated broadly or narrowly, whether the issue lies in the particular expertise of the agency and of experts generally,[48] whether it depends primarily on qualitative or quantitative assessments,[49] and whether it relates to other areas in which the agency has broad authority would be appropriate considerations. Some of these factors are mentioned in *Chevron* as justification for finding delegation in ambiguity.[50]

Second, as *Mead* indicates, the kind of procedure authorized by Congress and used by the agency seems pertinent, but more than just the formality of the process ought to be considered in the application of a multifactor standard. For example, the transparency of the process,[51] the degree of participation by affected interests, and the legal effect of the action that will emerge from the process (i.e., whether the ruling is

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because the agency interpretation is persuasive and reflects superior expertise, a less stringent level of deference provided in Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[46] See William S. Jordan III, *Updating Deference: The Court's 2001-2002 Term Sows More Confusion About* Chevron, 32 ELR 11459, 11463-67 (2002) (discussing cases).

[47] David J. Barron & Elena Kagan, supra note 4, at 223.

[48] See, e.g., Jonathan T. Molot, supra note 16, at 1255-56.

[49] See, e.g., Michael Abramowicz, *Toward a Jurisprudence of Cost-Benefit Analysis*, 100 Mich. L. Rev. 1708, 1731 (2002) (arguing for more deference to quantitative analysis by agencies, although one could make arguments for precisely the opposite conclusion if qualitative judgments depended more crucially on policy determinations).

[50] See, e.g., *Chevron*, 467 U.S. at 862-66.

[51] See, e.g., Michael J. Hayes, *After "Hiding the Ball" is Over: How the NLRB Must Change Its Approach to Decision-Making*, 33 Rutgers L. Rev. 523, 565 (2002) (discussing NLRB cases where courts have emphasized this factor).

broadly applicable and perhaps whether it is self-executing[52]) all seem relevant considerations. Third, Barron and Kagan have argued that deference ought to rest in some degree on who in the agency has made the actual interpretive decision, so that only decisions made by "the official Congress named in the relevant delegation" would qualify for *Chevron* deference.[53] One might disagree with the emphasis that Barron and Kagan place on this factor,[54] but it certainly is a candidate for consideration at least in some circumstances.

Fourth, although seemingly overlooked in the case law, characteristics of the particular agency are no doubt relevant to Congress when it decides whether to delegate law-interpreting powers. Notwithstanding the importance of this factor, none of the judicial approaches, whether they are rule-like or standard-like, make distinctions on the basis of which agency is interpreting the statute. Instead, *Chevron*'s rule has been applied to any ambiguous statutory language, regardless of which agency was charged with administering the regulatory program. Similarly, *Mead*'s safe harbor of certain formal procedures is available for any agency that has been granted the power to use such formats for policymaking. The absence of agency-specific considerations in the analysis seems strange, at least to the extent that the tests purport to discern actual congressional intent. Congress' decision to delegate authority to a particular agency is informed by both its view of agency capabilities generally and the reputation and qualifications of the particular agency.

Notwithstanding their apparent relevance, agency-specific variables tend not to be considered explicitly by courts, even when they use multifactor standards rather than across-the-board rules. Of course, determinations of agency expertise, arguably relevant to *Chevron* deference, perhaps available under *Mead*, and certainly relevant to application of *Skidmore* deference, can sometimes involve varying degrees of agency-specific evaluations.[55] One suspects that courts also treat agencies differently on the basis

[52] See, e.g., Thomas W. Merrill & Kristin E. Hickman, supra note 4, at 891 (discussing this factor in a different context).
[53] David J. Barron & Elena Kagan, supra note 4, at 235-36.
[54] See, e.g., Thomas W. Merrill & Kathryn Tongue Watts, supra note 19, at 578-79 n.620.
[55] See Jim Rossi, supra note 2, at 1135-36 (discussing in context of deference to rulings by the EEOC).

of their reputations, although this factor is not expressly identified as influential.[56] For example, some have noted that the National Labor Relations Board seems to be given less deference, in part because of its preference to make policy through adjudication and not rulemaking[57] but also because its reputation makes it suspect in some quarters.[58] Other agencies with problematic reputations, like the Federal Election Commission and the Immigration and Naturalization Service, may also receive less deference in practice, although this reality is seldom explicitly stated in opinions.[59]

If one wants to determine whether Congress really has delegated law-interpreting power to an agency, assessing the characteristics and general reputation of the agency is crucial. Relevant factors would include whether the agency is independent or under the direct control of the President, whether the agency is subject to capture by powerful interest groups and what sort of interest group activity typifies its regulatory environment, how politically salient the issues within the agency's jurisdiction are for the general public, the political pressures brought to bear on the agency by Congress, its committees and the President, and indications that the President, the Office of Management and Budget or other executive branch officers do not trust the agency. How

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[56] See Michael Abramowicz, supra note 49, at 1739 ("Perhaps courts already consider agency reputation implicitly, seeking to curtail agencies with a reputation for stretching their authority or achieving ideological objectives."). See also Peter H. Schuck & E. Donald Elliott, supra note 34, at 1021-22 (finding different "success" rates for different agencies, but suggesting that those differences could be a function of subject matter or procedural choice, rather than of agency reputation); Louis L. Jaffe, supra note 4, at 557 (making general point well before *Chevron*); Jerry L. Mashaw, *Agency Statutory Interpretation*, Issues in Leg. Scholarship, Dynamic Statutory Interpretation (2002): Article 9 (generally observing that agencies have different reputations depending on their behavior).

[57] It appears that interpretations adopted in formal adjudications do receive *Chevron* deference, a conclusion buttressed by *Mead*. See Steven Croley, supra note 30, at 3 (describing application of *Chevron* to formal adjudications). However, scholars have argued whether such deference in the context of formal adjudications is appropriate, and the judicial treatment has not been consistent. See Michael J. Hayes, supra note 51, at 564-71 (discussing scholarly debate and judicial opinions, but concluding that deference to NLRB adjudications is appropriate under *Chevron* and *Mead*).

[58] Not only might judges, particularly conservative ones, view the NLRB with distrust, but the statutory framework in which the Board operates might suggest that Congress views the agency as less deserving of deference. See Thomas W. Merrill, supra note 10, at 832. Merrill and Hickman argue that less deference is appropriately paid to NLRB interpretations through adjudication because the Board's orders are not self-executing. Thomas W. Merrill & Kristin E. Hickman, supra note 4, at 892. But see David J. Barron & Elena Kagan, supra note 4, at 219 (arguing that the fact courts must execute NLRB adjudicatory orders ought not to make a difference in the level of deference).

[59] The observation in the text is based in part on my experience as a clerk in the D.C. Circuit Court of Appeals and on the views of other clerks, including the moderator of this panel. Of course, both agencies have received *Chevron* deference in the past. See William S. Jordan III, *Judicial Review of Informal Statutory Interpretations: The Answer is* Chevron *Step Two, not* Christensen *or* Mead, 54 Admin. L. Rev. 719, 731 (2002).

these factors play out in each case is not obvious. For example, does evidence that the President is not pleased with the agency's regulatory decisions indicate that the agency relies on expertise, rather than politics, to set policy? And how should an agency weigh political considerations with other factors in interpreting its organic statute?

This list of factors is by no means exhaustive, although its breadth and complexity provide a sense of the challenge to courts in applying multifactor standards. The complexity is increased because the mix of factors will change over time as Congress' view of appropriate delegations changes, or as the relationship among the branches evolves. Moreover, the factors will sometimes point to different conclusions about the congressional delegation even within the same statute, adding to the complications.[60] In short, both types of judicial approaches—the across-the-board presumption which provides certainty (at least in theory) at the price of errors in determining congressional intent and the more nuanced standard which imposes decision costs on the judiciary with uncertain improvements in the error rate—have limitations. The fact that both types of judicial review are not entirely satisfactory may explain why courts have been unable to settle on one or the other and, for the time being, are inconsistently applying an uneasy combination of the two.

Although both *Marbury* and modern administrative law precedents indicate that Congress decides whether agencies or courts will be the primary interpreters of regulatory statutes, and that courts merely ascertain congressional intent as they determine "what the law is," the reality is that the judiciary, not Congress, is in the driver's seat. Express congressional directives are virtually nonexistent, and courts are unable to accurately find an implicit delegation or guess what the legislature might have done had it thought about the matter. Thus, the first institutional choice decision—which institution decides who will be the primary interpreter of unclear statutes—has been effectively resolved in favor of courts. One suspects that, among other considerations, the judges' views of the wisdom of the agency's interpretation affect the strength of the deference.[61] It is not therefore surprising that courts often determine that deference is

[60] See Cynthia R. Farina, supra note 4, at 472 (discussing Breyer's approach).

[61] See, e.g., Linda R. Cohen & Matthew L. Spitzer, supra note 34, at 108-09 (correctly predicting that the relatively politically conservative Supreme Court justices would adopt doctrines requiring less deference to agency interpretations as the Democrats had more influence on agency outcomes); Linda R. Cohen &

unwarranted; then judges do not face the unattractive prospect of upholding agency interpretations with which they do not agree. In other words, courts are interested parties with respect to the second institutional choice determination, and not surprisingly, they make the choice in favor of judicial primacy in many cases. But because they understand that the doctrine demands they obey any congressional instruction, the jurisprudence has been unstable as courts vacillate among various unsatisfactory methods purporting to enable them to find congressional intent. Courts seem unwilling to eschew the inquiry into intent altogether and explicitly embark on the formulation of a judicial doctrine, perhaps based solely on institutional considerations, that could provide more certainty for regulated parties, agencies, and Congress.

But is this the only possible state of affairs? How would the second institutional-choice decision—whether agencies or courts have the primary responsibility to interpret statutes—be resolved if Congress more frequently provided clear instructions? Whether such explicit congressional directives are likely or even possible is the question I turn to next.

II. Providing Congress the Opportunity to Legislate *Chevron*

The decision to delegate law-interpreting authority to an agency or a court is different from the sort of delegation decision Congress usually makes in the regulatory context. Typically, Congress is determining substantive policy, and the extent of detail it provides in the delegation will determine how much discretion the subsequent policymaker has as it pursues regulatory objectives. Here, however, the delegation concerns which institution is given the discretion to set policy—courts or agencies. Congress can provide more or less detail to constrain the discretion, and that decision may be affected by the congressional view of the institution that will exercise the discretion. Nonetheless, it may be helpful to differentiate this delegation decision—which institution makes policy through statutory interpretation—from the decision of how to delegate and with what

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Matthew L. Spitzer, *Judicial Deference to Agency Action: A Rational Choice Theory and an Empirical Test*, 68 S. Cal. L. Rev. 431, 474-75 (1996) (finding that "the Court does not uniformly endorse judicial deference, but rather does so discriminately in the years where the doctrine yields policy outcomes more to the Court's liking.").

amount of specificity, the decision that the delegation scholarship typically focuses on.[62] As I discussed above in the context of describing how courts might assess that choice between institutions, a variety of factors are relevant to determine institutional competence to make policy within the authority delegated through vague, ambiguous, or incomplete language. These factors relate to the nature of the issue, the procedures through which agency interpretations will be reached, the position of the agency official likely to adopt the interpretation, the reputation and expertise of the agency itself, the need for a relatively independent determination rather than a decision infused with politics and specific regulatory missions, and the need to integrate an interpretive decision into a complex regulatory framework. Congress is better suited than the courts to weighing these factors in the larger context of designing the regulatory state and those entities that will administer it.

A. Congress and Opt-Out Provisions of Default Rules of Judicial Review of Regulatory Statutes

Congress, because of its frequent interactions with agency personnel, has a better sense than the judicial branch of the expertise that can be brought to bear by a particular agency on a question of statutory interpretation. Lawmakers either already know or can easily gather information using committees, staff and witnesses about the larger statutory framework in which an agency works, the general level of discretion accorded to the agency, and the reputation that the agency has developed over time and enjoys currently. Little of that information will be available to a court trying to determine, within the confines of a particular case dealing with specific facts and parties, whether it should defer to an agency interpretation of a few words of statutory text. In addition, Congress can revise its decision to delegate authority to an agency or the judiciary to account for changes in the regulatory environment, changes that are often related to expertise but might also turn on changes in the political environment. A court finds revision more

[62] See, e.g., David Schoenbrod, Power Without Responsibility: How Congress Abuses the People Through Delegation (1993). To the extent the scholarship focuses on institutional choice questions, it is usually concerned with the choice among agencies, taking account of their different characteristics. See, e.g., David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Approach to Policy Making Under Separate Powers 151-54 (1999).

difficult, both because it must wait for an appropriate case and because it often lacks the information necessary to justify changing course. Thus, Congress has technocratic advantages over courts for a variety of reasons: its institutional design, access to experts, repeat interactions with the agency, and a more comprehensive perspective.

Political considerations also play a vital role in any decision to allocate law-interpreting authority to an agency or to the courts because interpretation in these contexts is an aspect of regulatory policymaking. Determining the appropriate regulatory program, including identifying regulatory objectives, prioritizing among various objectives in a world of limited resources, and choosing the means to reach the objectives considered most worthy of attention, is a process that necessarily and appropriately involves both expertise and politics. Agencies are sensitive to the demands of two political principals that they serve—the President and Congress—and constantly balance those demands within the structure of the regulatory framework put into place by an earlier group of lawmakers and shaped by the history of the actions of other Presidents and executive branch officers.[63] *Chevron*'s preference that agencies interpret ambiguous statutory language or fill in statutory lacunae was based in part on the Court's understanding of the relevance of policy and politics to such determinations and its own institutional limitations in this respect.[64] However, it might be the case that, in some circumstances, the enacting Congress will prefer that policymaking through interpretation be more insulated from current political pressures than is possible in the agency environment, even in an independent agency that is somewhat separate from the President. Whatever the allocative choice, it is based in part on political considerations—that is, deciding how extensive a continuing role politics should play in regulatory policymaking is itself a political decision, taking account of the need to consider current political realities during implementation of a regulatory structure devised in the past.

Once it is acknowledged that political considerations are legitimate, along with expertise-related considerations, in the interpretation of regulatory statutes, the desirability of Congress' playing a more active role in allocating law-interpreting authority either to agencies or courts becomes apparent. Congress has the comparative

[63] See Jerry L. Mashaw, supra note 56, at 14 (discussing various political influences at work to shape agency policymaking).
[64] See *Chevron*, 467 U.S. at 865-66.

advantage over the judiciary in making the determination concerning the appropriate role of politics and making it publicly. Courts are loathe to discuss political factors transparently in their opinions. In a related context of judicial review of the reasonableness of the National Highway Transportation Safety Administration's decision under President Reagan to rescind certain passive restraint regulations, only Justice Rehnquist explicitly addressed the clear political overtones of the agency's decisions:

> The agency's changed view of the [passive restraint] standard seems to be related to the election of a new President of a different political party. … A change in administration brought about by people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.[65]

The unwillingness of the *State Farm* majority to assess the presence and importance of political considerations reflects a general judicial distaste for such analysis. Generally, then, courts either try to avoid the political analysis—which denies them access to an important consideration in the decision whether the allocate law-interpreting authority to agencies or retain it themselves—or they do not reveal the role that such an analysis plays in their decision, thereby undermining the ability of the public to understand and evaluate regulatory policy. The first strategy leads to incomplete decisionmaking, and the second is incompatible with norms of democratic accountability. Thus, Congress' comparative advantage is not merely technocratic, it is essentially an advantage held by the more democratic institution in the context of political decisions that should reflect policy judgments of representatives who must answer to the people.

If Congress has a greater capacity to compare the judicial and executive branches and determine which should be given law-interpreting power in the context of the larger regulatory scheme, why not require better evidence that Congress has actually made the delegation decision? One answer is no better evidence is required. Congress would generally want courts to defer to agency interpretations of ambiguous statutory text, so a default rule allocating the power to agencies captures what is usually the right answer. If

[65] Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part). The regulatory decision at issue in *Chevron* was also the result, in significant part, of a change in presidential administration and political mood.

Congress has not acted in the face of judicial application of an across-the-board presumption, then it must have approved of the effect of the default rule. To put it another way, a default rule could be intent-mimicking in the way that some contract default rules work to decrease transaction costs by specifying what parties would typically want.[66] If such a default rule operated successfully, Congress would have to enact express directives only in the small number of cases where it prefers that courts serve as the primary interpreters of vague and ambiguous language. The default rule would thus reduce transactions costs for Congress and allow it to deploy its limited resources more effectively.

One problem with this answer is that it is not clear that an intent-mimicking default rule is appropriate here. When important constitutional values are at stake, as *Marbury* suggests they are in this context, the default can be set so that it protects those values and requires Congress to state explicitly that it wishes to adopt a policy close to the constitutional gray area.[67] However, if the realities of the legislative process make it unlikely that Congress actually can enact express directives, a *Marbury*-inspired default rule means that courts will defer to agencies in only a handful of cases. In that case, a compelling normative argument can be mounted for the opposite approach: an across-the-board presumption of deference to agencies. In the face of persistent congressional silence, courts should choose a rule that allocates lawmaking authority to the democratically accountable and more expert agencies, rather than to the judiciary. Perhaps that allocation comports with congressional intent, but that is not seen as the primary justification for the rule, which is a pragmatic approach to deal with the reality of congressional inaction. Congress, rather than courts, may have the better technocratic and democratic credentials when it comes to allocating the power to interpret laws, but Congress does not discharge this responsibility. It is thus better to adopt a rule that places primary interpretive authority with the agencies, rather than the courts, because of the former's superior technocratic and democratic credentials.[68] As this disagreement demonstrates, the default rule of judicial review for regulatory statutes can be chosen

[66] See Elizabeth Garrett, *Legal Scholarship in the Age of Legislation*, 34 Tulsa L.J. 679, 681-82 (1999).
[67] See id. at 685-86.
[68] See Cass R. Sunstein, *Is Tobacco a Drug? Administrative Agencies as Common Law Courts*, 47 Duke L.J. 1013, 1056-57 (1998).

without paying much attention to what Congress intended or might have intended. Instead, it can be set according to one's vision of the appropriate role of agencies and courts in policymaking through statutory interpretation, but with an opt-out provision that allows congressional variance.

Some current scholarship revolves around this disagreement over the right background rule for courts to adopt. These scholars sometimes treat congressional intent as a relevant but not paramount concern, but more importantly they appear to have given up on the notion that Congress might decide how to allocate law-interpreting authority in any but the rarest of cases. To put it another way, these scholars accept that the first institutional choice decision I have identified—whether Congress or the courts will decide which institution has the power to interpret regulatory statutes—has been essentially made in favor of courts. Thus, they seek to focus our attention on ways to improve the judicial decision about whether or not to defer to agencies. For example, Cass Sunstein argues that such a judgment should based on institutional attributes, and he favors locating law-interpreting authority in the agencies because their "democratic pedigree" is clearly more impressive than the courts.[69] In addition, interpretation of ambiguous terms in regulatory statutes is closely related to "an understanding of underlying facts," and agencies have the better technocratic credentials to make these judgment calls.[70]

Merrill and Watt also favor judicial adoption of a bright-line rule, although they link their proposal more closely to ascertaining actual congressional intent. Their historical analysis of judicial review of regulatory statutes concludes with a discussion of various possible default rules, or canons, that courts could apply in a rule-like fashion. They favor a particular approach based on their understanding of the drafting convention used by Congress in the first half of the last century, but their primary conclusion is that the judiciary should adopt some sort of general rule, rather than an ad hoc application of a standard, because "then Congress will generally know what to say in a statute to

[69] Cass R. Sunstein, supra note 68, at 1056.

[70] Id. at 1057. See also Adrian Vermeule, supra note 42, at [12-13] (giving serious consideration to adopting the *Mead* procedural safe harbor as a rule of judicial review and adopting an institutional approach throughout his analysis); Cass R. Sunstein & Adrian Vermeule, supra note 9 (arguing in favor of institutional approach in variety of contexts including interpretation of regulatory statutes).

delegate" to an agency the power to act with force of law."[71] They envision a dialogue between Congress and the courts in which the legislature communicates relatively clearly with judges through statutory language. If that institutional discussion takes place, courts can more legitimately reach conclusions about congressional intent to delegate.

Thus, all the approaches to the question of judicial review include some role for Congress to play, and in some cases that role is envisioned as relatively active. If the judicial approach is conceived as intent-mimicking, then it must be grounded by some theory about congressional intent and the ability of Congress to vary the rule when its intent is different. If the rule is set for some other reason, either to empower the judiciary to interpret the law in the context of regulatory statutes as it does with respect to other statutes or to empower agencies to use statutory interpretation as a policymaking tool, room is left for Congress to strike the balance differently in a particular case. Presumably, the congressional opt-out feature of the default rule proposals is designed to be real and not illusory, although few commentators hold out much hope that Congress will respond frequently, if at all. Such pessimism has an empirical basis. Despite the invitation to Congress to interact with the courts in setting the appropriate level of judicial review, Congress generally remains silent. That silence is mystifying no matter what general approach to judicial review one favors because it seems unlikely that Congress would never—or almost never—want to vary the background interpretive regime.

Perhaps Congress' silence reflects its confusion about the default rule. Scholarly proposals, like those discussed above, favor consistent application of a bright-line rule that would provide Congress with a clear interpretive background. This vision of the optimal judicial review diverges substantially from the reality of the judiciary's zigzagging course through a variety of approaches, each of which is applied inconsistently. Even after the *Chevron* decision, its scope remained unclear, and judges increasingly found deference unnecessary as they aggressively used interpretive techniques at Step One. The application of the recently-adopted *Mead* approach has so far been similarly inconsistent.[72] Without a certain interpretive background, Congress does not know where to focus its attention. It is certainly unrealistic to think that it will

[71] Thomas W. Merrill & Kathryn Tongue Watts, supra note 19, at 579.
[72] See id. at 576 n.615 (discussing subsequent Supreme Court cases); Adrian Vermeule, supra note 42 (discussing application in the D.C. Circuit).

delegate clearly in every statute, so the inability to target intelligently may reduce the chance that it targets at all. Even in the unlikely event that courts choose a presumption and stick with it, it is not clear that any judicial canon can be frequently salient to lawmakers during the legislative process. Staff members and experts in the body may think about judicial doctrines when crafting bills, but these considerations may fade in the press of legislative business.

A legislative rule backed up with enforcement procedures can be more broadly and frequently salient to lawmakers, particularly if the internal rules are triggered when legislation relevant to the agency's authority is being considered. In other words, Congress may not have entered into this dialogue with the courts either because it has no clear idea of what it is responding to, or because it forgets that an invitation to communicate has been offered. Of course, Congress often finds it difficult to muster majority support for clear statutory text, so vagueness and ambiguity in this realm may simply be another example of the congressional penchant for open-textured language as a way to avoid opposition and surmount the procedural obstacles to enactment. No procedure can eliminate lawmakers' desire to sometimes avoid making difficult political decisions, although rules can empower a few members who seek clear resolution of such issues to force a vote of the body on the matter.

B. Devising an Action-Prompting Mechanism to Structure Congressional Decisionmaking

Congressional silence may be primarily the product of congressional unwillingness to address the issue. Rather than taking responsibility for choosing the law-interpreting institution with respect to regulatory statutes, lawmakers may often seek to avoid the decision by punting it to the judiciary. But it seems unlikely that Congress would avoid making the institutional choice decision in virtually every case. Surely, there are some instances where enough lawmakers, either because of constituent pressures, ideology, or party pressure, would be willing to provide clear instructions if they had the power under congressional procedures to bring the matter to the attention of the full body. The widespread acceptance of the conclusion that Congress is very unlikely to provide clearer

directives allocating law-interpreting authority to agencies or courts is supported by an unduly cramped view of the legislative vehicles available for Congress to use as a means of communication, and a general ignorance in legal scholarship of various internal enforcement mechanisms that can increase the chance of congressional consideration of particular issues. Only two kinds of legislative vehicles have been discussed in the literature as mechanisms for Congress to use to opt out of a default rule of judicial review; both have limitations.

First, Congress could pass a broad statute allocating the law-interpreting power to either agencies or courts with respect to all questions of ambiguous language, or perhaps assigning the power to agencies in certain defined circumstances (such as when they use particular procedures) and to courts in all other instances. Section 706 of the Administrative Procedure Act appears to be such a general articulation of institutional choice, requiring the "reviewing court to decide all relevant questions of law, interpret constitutional or statutory provisions, and determine the meaning or applicability of the terms of an agency action." The Bumpers amendment, considered by Congress in the 1970s and early 1980s, was this sort of statute designed to underscore that the judiciary should determine the meaning of statutory terms in regulatory statutes in the same way that they interpret text in other statutes.[73] Had the Bumpers amendment passed, courts arguably would not have been justified in according substantial deference to agency interpretations, but could have considered them only as extrinsic evidence from an expert source.

This legislative approach has certain advantages. It applies the congressional rule to all statutes, even those enacted in the past. It can exempt certain statutes from the blanket rule in a savings provision, just as it can vary the rule in subsequent enactments through express provisions. Such a congressional enactment might also be more salient to Congress than a judicially-adopted across-the-board presumption, and thus spark more consideration of the delegation issue when Congress enacts new regulatory statutes. In addition, interest groups may be less influential with respect to a general provision than

[73] Under Senator Bumpers' legislation, courts would have been required to "independently" decide all questions of law, including statutory interpretation questions. See Statement of Senator Bumpers on S. 2408, 121 Cong. Rec. 29956-58 (Sept. 27, 1975); Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, Regulatory Procedures Act of 1981, H.R. 746, Serial No. 27 (1981).

they would be in the context of statute-specific provisions.[74] Such a broad statute forces interest groups to operate behind a somewhat opaque veil of ignorance because they cannot be sure of their positions on all affected statutes, or they may be in different positions depending on the program and agency.[75]

Nonetheless, such "superstatutes" in the regulatory arena have been problematic for many in Congress who believe that a one-size-fits-all or one-size-fits-mostly-all approach is heavy-handed. Others may be worried that applying such a general rule to all previously-enacted statutes would be unwise and lead to unanticipated consequences. Because Congress cannot possibly predict all the possible applications of the general rule, it may be better to resolve the delegation issue in a more targeted way, or to leave the decision to the judiciary that proceeds in a case-by-case way.[76] Nonetheless, there has been some support for the approach in the past; the Bumper amendment was nearly enacted, passing the Senate unanimously, only a few years before the Court decided *Chevron*.[77]

Alternatively, Congress could make the delegation decision with respect to each regulatory statute. Not only does this seem unlikely, given past behavior and institutional limitations, the approach affects only statutes enacted in the future. For a more comprehensive solution, Congress would be required to embark on a parallel effort to assess past statutes and decide what guidance is appropriate. Congress does not typically undertake retrospective analysis of past regulatory statutes, even when it adopts new procedural approaches that will apply broadly to future laws.[78] Even if Congress was

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[74] See Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 Stan. L. Rev. 247, 274-75 (1996) (making this point in the context of different "supermandate" proposals in the regulatory arena).

[75] See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399 (2001) (making point generally); Elizabeth Garrett, *The Impact of* Bush v. Gore *on Future Democratic Politics, in* The Future of Democratic Politics: Principles and Practices __, __ (G. Pomper & M.D. Weiner eds. 2003) (forthcoming) (discussing this type of interest group behavior in a different congressional context).

[76] See Thomas W. Merrill, supra note 34, at 1031 (arguing that a Bumpers amendment approach would be an "overreaction").

[77] See Cynthia R. Farina, supra note 4, at 474-75. See also James T. O'Reilly, *Deference Makes a Difference: A Study of Impacts of the Bumpers Judicial Review Amendment*, 49 U. Cin. L. Rev. 739 (1980). But see Cass R. Sunstein, supra note 74, at 251-53 (observing that such far-reaching statutes are difficult to pass in the regulatory context).

[78] See, e.g., Unfunded Mandates Reform Act of 1995, which applied only to new mandates. Although Title III required the Advisory Commission on Intergovernmental Relations to review unfunded mandate generally, there were no enforcement provisions in this title, unlike the provisions affecting new mandates. See also Thomas W. Merrill, supra note 10, at 824 ("Congress does not have the time or institutional

disposed to review old statutes and amend them to include instructions about law-interpreting authority, the sheer number of regulatory statutes renders the task a formidable one. Given limited time and energy, lawmakers would review only a few enactments, leaving the rule with regard to the others to courts to determine.

Although pessimistic conclusions about Congress' ability to respond to a general rule of judicial review and delegate clearly are understandable, we can expect more from Congress, particularly if its attention is brought to a realistic mechanism through which to communicate. Such a mechanism could be action-forcing, or more likely it would be action-prompting in that Congress could still avoid making an explicit decision, notwithstanding the procedural reform. There are promising legislative mechanisms that could be slightly reconfigured to make it more likely that Congress was aware of its power to vary the rule of judicial review and to empower groups of lawmakers who wished to prompt consideration and passage of express direction. These legislative vehicles represent a middle-ground approach between a broad statute along the lines of the Bumpers Amendment and a time-consuming statute-by-statute assessment. Congress currently reviews agencies periodically, every few years when it re-authorizes agencies or large programs administered by agencies, and annually when it appropriates money to keep the government operating.[79] Congress could use these periodically-considered legislative vehicles to instruct courts and agencies about its decision with regard to law-interpreting authority. Provisions in these bills could instruct that law-interpreting authority was delegated generally to a particular agency, that it was delegated to an agency in all cases where particular procedures were used, that it was delegated only with respect to certain statutes, or that it was not delegated to the agency at all. These bills

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capacity to review and amend all existing delegations to agencies to add the appropriate tag line to assure the desired allocation of interpretational authority is reached.").

[79] Executive branch departments and agencies are funded through discretionary spending, which means that Congress evaluates the agencies and their funding needs annually during the appropriations cycle. See Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 Harv. J. Legis. 387, 398-400 (1998) (describing discretionary spending and budget process generally). Some programs administered by agencies are not funded through discretionary appropriations but instead receive funding through direct spending, which means their funding occurs automatically until Congress amends or repeals the underlying statute. Social Security, Medicare, and some transportation and agriculture programs are examples of this sort of direct or mandatory spending. Although these programs are not reviewed through the annual appropriations process and may not be reviewed periodically through the re-authorization process, they are administered by agencies that rely on discretionary funds, so the decisions about law-interpreting authority relating to these direct spending programs could be made when agency funding is before Congress.

would allow Congress to resolve the issue in a more targeted way than a superstatute would, but it would similarly provide a format where the delegation would apply to previously-enacted statutes within an agency's jurisdiction and to subsequent statutes.

Three different kinds of legislative vehicles—authorization laws, appropriations bills, and omnibus appropriations legislation—could be used by Congress; however, the formats are not equally well-suited to provide an appropriate context for congressional deliberation and decisionmaking. First, authorizing legislation is the optimal vehicle for such provisions. As Allen Schick explains:

> Authorizations represent the exercise of the legislative power accorded to Congress by the Constitution. … In exercising its legislative power, Congress can place just about any kind of provision in an authorization. It can prescribe what an agency must or may not do in carrying out assigned responsibilities. It can spell out the agency's organizational structure and its operating procedures. It can grant an agency broad authority or restrict its operating freedom by legislating in great detail.[80]

Authorization bills design agencies, and a crucial part of agency design is what kind of lawmaking authority, including the power to interpret ambiguous language, the agency should receive and how it should deploy that power. Again, this type of delegation decision is different from the typical one in a regulatory statute: here, Congress is determining the design of regulatory institutions, not the detail of its substantive policy instructions. Thus, the decision seems particularly well-suited to the environment of authorizing bills; the deliberative process on the *Chevron* issue would be enhanced if it occurred during a comprehensive evaluation of the agency.

There are two kinds of authorizing legislation. An organic or enabling statute sets up the agency or program, containing broad grants of authority, establishing jobs and duties, and spelling out policy details. Related legislation authorizes the appropriation of funds for particular responsibilities or programs; these laws provide the basis for subsequent and separate appropriations bills that actually provide funding.[81] Since the 1960s, Congress has increasingly used temporary authorizations of the second type so that it will have opportunities to oversee, reconsider and change programs on the basis of

[80] Allen Schick, The Federal Budget: Politics, Policy, Process 164 (rev. ed. 2000).
[81] Congressional Budget Office, Unauthorized Appropriations and Expiring Authorizations 2 (Jan. 15, 2003).

experience and the implementing agency's performance.[82] In some cases, events have caused Congress to change programs and agencies from permanent authorizations to temporary ones in order to increase oversight. Thus, programs like the Safe Drinking Water Act, the Superfund, recent reform of federal welfare laws, and the Rural Electrification Loan Restructuring program, and agencies like the Department of Justice, NASA, and the Securities and Exchange Commission must be reauthorized periodically.

One advantage of using the authorization process to consider which institution should have primary responsibility to interpret regulatory statutes is that it may structure interest group activity in a relatively productive way. In many cases, the key to harnessing interest groups is to construct an environment in which they can bring forth information that will help lawmakers decide on their course of action[83] but that also has enough uncertainty in it that groups are not entirely sure how any particular decision will advance their interests. The latter feature restrains the ability of groups to pursue their narrow self-interest, although there must be enough information about the future so that policymakers can legislate with sufficient detail.[84] A moderate amount of uncertainty for affected parties is present during the authorization process, which typically runs on a three-, five-, or even ten-year cycle. When agencies and large programs are being designed, or when they are being redesigned in the re-authorization process, interest groups have some experience with the agencies and can anticipate the areas of regulatory emphasis, so they will work to influence lawmakers and to provide them with relevant information about the agency's performance. However, at the same time, interest groups may not be entirely certain of which particular issues the agency will place on the top of the regulatory agenda in the next few years. Thus, they may not be sure whether they will prefer courts or agencies to have the primary responsibility for statutory interpretation, a situation that can restrain self-interested behavior to some extent.

To ensure that Congress actually considered the delegation issue and reached some decision that was clearly expressed in the legislation, the legislature could adopt internal rules mandating that these provisions be included in any authorization bill

[82] Allen Schick, supra note 80, at 168-70.
[83] For a discussion of the role of interest groups in providing information to policymakers, see Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. Chi. L. Rev. 501, 556-61 (1998).
[84] See Adrian Vermeule, supra note 75, at 428 (discussing information-neutrality tradeoff).

reported out of committee. A modern committee report contains a great deal of mandatory information, some required by budget rules, some by other congressional rules. In the House, for example, each committee report contains relevant oversight findings and recommendations, cost estimates, a statement of the constitutional authority supporting enactment of the bill, an estimate of the costs of any federal mandate on state and local governments, and a preemption statement.[85] Although many rules deal with the content of committee reports, congressional rules could encourage lawmakers to place any delegation of law-interpreting authority in the legislation itself to ensure that courts and agencies understood that the instruction has the force of law.

Internal rules governing the content of legislation and committee reports could be enforced in both houses through a point of order process. Points of order allow members of Congress to object to the consideration of laws that violate congressional rules and to force a vote of the body before deliberation can proceed. In the Senate, some budget points of order are enforced through supermajority voting requirements so that a three-fifths vote is mandated to waive the objection. In the House, the point-of-order process can be made more effective by prohibiting waiver of any such objections in the special rule promulgated by the Rules Committee that structures floor deliberation.[86] The enforcement provisions should be calibrated to ensure that Congress would have an opportunity to consider the issue of delegating law-interpreting authority to agencies while not providing those who want to obstruct passage of the underlying bills too great a strategic advantage. In this context, a relatively low level of enforcement is required, because the *Chevron* issue is not especially different from other delegation issues that do not receive enhanced protection. Thus, the procedure should rely on simple majority votes to waive the points of order and require that a group of lawmakers agree to raise the objection rather than allowing only one member to stall any bill on this ground. If this mechanism is envisioned as a procedure that will be used only infrequently to vary the application of a consistently applied judicial default rule, then the enforcement

[85] House Committee on Rules, A Primer on Committee Reports, available at http://www.house.gov/rules/comm._rep_primer.htm (visited on Jan. 20, 2003).

[86] See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L.J. 1277, 1326-30 (2001) (discussing such an enforcement mechanism in the context of a proposal for a congressional framework to improve constitutional decisionmaking).

mechanisms should be even less stringent, requiring a relatively large group of lawmakers to trigger it and perhaps allowing waiver in the House by a special rule.

Enforcement would be easier here because interest groups affected by regulation would have an incentive to lobby Congress either to withhold the authority from agencies or to transfer traditional law-interpreting power to them from the courts, depending on how they expected to fare in a particular forum. Various interest groups would be affected differently by the decision, so there would likely be groups on both sides of the issue. Scholars who have brought theoretical frameworks to bear on the question of whether regulated groups generally prefer court interpretation to agency interpretation have reached differing conclusions.[87] It seems safe to say that interests have various objectives, and that their views on the institutional choice question will change over time. In addition, study of the process of interpretation used by courts and agencies suggests that the two different institutions use different methods and assess information like legislative history and canons of construction differently.[88] Agencies may often reach different conclusions than courts about the meaning of contested statutory language because their interpretation is necessarily infused with their views of their larger regulatory missions. Indeed, different agencies may approach interpretation differently.[89] These differences in interpretive approach would be relevant to interest groups and lawmakers. Such differences could lead interest groups to favor one interpreter or the other in particular circumstances, depending on how they expected the different approaches to influence the substantive outcomes.

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[87] Compare Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 Nw. U. L. Rev. 296 (1993) (concluding, after empirical analysis, that regulated interests will prefer courts to interpret ambiguous statutory language) with Frank H. Easterbrook, *The Demand for Judicial Review*, 88 Nw. U. L. Rev. 372 (1993) (reaching opposite conclusion, based on economic theory and revealed preferences), and William N. Eskridge, Jr., *The Judicial Review Game*, 88 Nw. U. L. Rev. 382 (1993) (same, using positive political theory).

[88] See generally Jerry L. Mashaw, supra note 56 (discussing institutional differences and recommending different approaches); Peter L. Strauss, *When the Judge is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 Chi.-Kent L. Rev. 321 (1990) (discussing different institutional capacities and incentives with respect to the use of legislative history).

[89] See Jerry L. Mashaw, supra note 56, at 23 (discussing differences between Environmental Protection Agency and Department of Health and Human Resources).

Although sometimes the existence of contending interest groups encourages Congress to avoid deciding a matter, leaving it to be resolved by courts or agencies,[90] a procedural framework can make abdication more difficult or can change the message of congressional silence. For example, once an internal rule required Congress to delegate law-interpreting authority to agencies in particular legislative vehicles, failure to make such a delegation might be read by courts as a signal for judges to act as primary interpreters of regulatory statutes. Groups that prefer agency interpretation would know that they would be less likely to convince a court to defer and thus have a greater incentive than they do today to convince Congress to delegate explicitly. Alternatively, if the courts adopted one of the approaches urged on them by some scholars and decided to apply a canon consistently that requires deference to agencies either whenever statutory text is ambiguous or a particular decisionmaking procedure is used, then congressional silence would empower agencies. No matter what the default rule applied by courts to determine the effect of congressional silence, once it is clearly established, interest groups would respond accordingly, focusing their efforts on taking advantage of the action-prompting mechanism put in place by the internal congressional rule.

Although authorizing legislation is the best vehicle for directives about law-interpreting authority, it would not solve the problem for all statutes and all agencies. First, some agencies and programs have permanent authorizations so periodic assessment is not institutionalized. Nevertheless, Congress could revisit programs and agencies with permanent authorizations and amend the statutes, and it might be somewhat more likely to do so when the delegation issue was made salient by a new congressional process affecting reauthorizations and new authorizing legislation. Second, Congress occasionally fails to authorize programs to which it nonetheless appropriates money. Although internal rules require that programs have current authorizations before appropriations are in order, Congress can waive these rules expressly or implicitly by passing an appropriations law that establishes or continues funding for the program or agency. Congressional rules

[90] See Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982) (discussing this congressional strategy); William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 59 (3d ed. 2001) (relying on work by economists and political scientists to present a transactional theory of legislative process that includes this prediction).

discourage substantive legislation on appropriations bills, but such riders are commonplace and have the force of law once enacted.

Accordingly, a second legislative vehicle—appropriations bills—could be used in some instances where the authorization process was unavailable. Any new procedure requiring Congress to delegate law-interpreting authority expressly should also apply to appropriations bills, encouraging explicit statements of delegations for programs that are either permanently authorized or not currently authorized. The Congressional Budget Office maintains lists of such programs[91] so it is not difficult to discover when a delegation should occur in an appropriations bill. A point of order process could be used to enforce the rule.

Using the appropriations process is not the best way to make the decision. One of the reasons that legislative riders on appropriations bills are discouraged by congressional rule and judicial decision is that the deliberation surrounding such bills focuses less on program design and more on funding level. In the frenzy that can accompany spending decisions, lawmakers may be less attentive to details of program and agency design. The system of dividing authorization bills from appropriations measures is supposed to ensure a dual level of oversight with the substantive committees shouldering the primary responsibility for institutional design. The delegation of law-interpreting authority is more clearly in the competence of the authorizing committees than in that of the appropriations subcommittees. Furthermore, appropriations bills are considered and passed annually, rather than every few years, and this frequency is not optimal for decisions about law-interpreting authority or other fundamental aspects of regulatory design.

Nonetheless, in the real world of the legislative process, the appropriations subcommittees have a great deal of responsibility over substantive details of programs and exercise some amount of oversight. Thus, they have the expertise to make this decision, at least when compared to courts. Moreover, if the substantive committees understand that they would cede their power to allocate law-interpreting power to other lawmakers should they fail to live up their responsibility, they would have an incentive to

[91] See, e.g., Congressional Budget Office, supra note 81 (required by section 202(e)(3) of the Congressional Budget and Impoundment Control Act).

provide directives to courts and agencies. If Congress provided its directions about law interpretation in an appropriations bills through the mechanism proposed here, courts would not be justified in applying the traditional canon construing riders to appropriations bills narrowly.[92] The procedural mechanism and increased scrutiny would ameliorate the concerns about deliberative pathologies that undergird the use of the canon in other contexts.

Of course, just as substantive committees sometimes fail to pass authorizing legislation, in some years Congress fails to pass all the appropriations bills. In such years, the government is funded either through continuing resolutions or, once an overall agreement on funding has been reached, through an omnibus appropriations bill.[93] These legislative vehicles are not especially conducive to substantive provisions like those delegating law-interpreting authority to agencies, although they can contain substantive provisions and riders. They provide the least desirable context for Congress to legislate *Chevron* issues because the environment in which they are considered and passed makes it very likely that Congress would ignore any action-prompting mechanism and override any enforcement procedures. Thus, I do not recommend extending the procedure to include these bills when the other two legislative formats have not produced a clear legislative instruction. In years where the appropriations process breaks down (which tends to affect only some agencies and programs because usually a few of the thirteen appropriations bills are passed) and the authorization process is unavailable, previously enacted provisions allocating the authority would remain in effect. If no such provisions had been passed or had expired, the courts could proceed in the absence of a congressional delegation, interpreting the regulatory statute as they interpret other laws and considering agency views as persuasive but not controlling. Alternatively, if the judiciary was convinced that a background default rule of deference to the agency was

[92] See William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation 172 (200) (discussing the canon).

[93] Fiscal year 2003 was such a year; Congress did not complete work on eleven of the thirteen appropriations bills until February, over four months late. It finally enacted them in one large omnibus act. See Carl Huse, *Spending Bill Is Scorned But Is a Sure Vote-Getter*, N.Y. Times, Feb. 14, 2003, at A22 (criticizing both the process and the substance of the omnibus appropriations bill). Between the end of fiscal year 2002 and passage of the omnibus act, the government was funded through a series of continuing resolutions.

justified on normative grounds, then courts would understand silence to signal congressional acceptance of deference in this instance.

A procedural framework would make this issue of delegation more salient to lawmakers, and it would encourage the use of legislative vehicles that are regularly and frequently considered. The structure of these laws would enable Congress to make the proper trade-offs, thinking globally about agencies' institutional competence, more specifically about a particular agency's abilities, and finally about particular statutes and programs within the agency's jurisdiction. Although it seems likely that Congress would often prefer to delegate this aspect of policymaking power to agencies, over which it has more influence than it does over the independent judiciary, the legislature would likely reach the opposite conclusion at least some of the time. Not only would some interest groups work to influence the legislature to favor the courts in some instances, but in the past Congress has demonstrated a preference for courts to act as the primary interpreter of regulatory statutes. The Administrative Procedure Act contains such a statement, and the Bumpers Amendment, that nearly passed Congress, favored courts over agencies in all circumstances. Senator Bumpers justified his proposal by arguing that courts would ensure greater fidelity to congressional desires, whereas agencies would follow the lead of the President or implement their own policy goals notwithstanding congressional intent.[94] Although many in Congress are unlikely to share Bumpers' preference because they will understand their greater influence over agencies through oversight, appropriations, and jawboning, the history of legislative action in this arena suggests that Congress would sometimes delegate to courts or restrict the delegation to agencies, particularly when it would have the opportunity to revisit its decision in the future.

C. Limitations of the Action-Prompting Mechanism and the Need for a Continuing Judicial Role

Although promising, this proposal has some evident limitations. First and foremost is the concern that Congress would continue to evade its responsibility and

[94] See Statement of Senator Dale Bumpers (D-Ark.) on the Introduction of S. 2408, 121 Cong. Rec. 29956, 29957 (Sept. 24, 1975).

avoid express delegations notwithstanding the procedural framework. If Congress were silent on the delegation issue even after adopting a procedural structure to prompt a decision, courts might be justified in taking primary responsibility for interpreting regulatory statutes. Under the traditional approach that is tied to congressional intent, deference on the basis of delegation would seem inappropriate in such circumstances. Adopting such a procedure would signal that Congress hoped to provide better directives to courts; therefore, the absence of an express delegation would have a different meaning than it does now. To put it another way, if the background rule is that courts are the primary interpreters of ambiguous statutory text, then congressional silence could be take to mean that Congress had made the institutional-choice decision in favor of allowing courts to carry on their usual role. Alternatively, congressional silence could be understood as a decision by Congress to let the courts determine which institution, courts or agencies, should have the primary responsibility to make policy through statutory interpretation. In this case, courts might decide, perhaps on institutional grounds, to adopt and consistently apply some default rule of deference, understanding that the action-prompting procedure in Congress would make it more likely that the legislature could vary the default when it wanted to. The point here is a general one: judicial doctrines should take account of the realities of the legislative process, and legislative process should be reconfigured to allow Congress a realistic opportunity to take advantage of opt-out provisions in default rules of judicial review, whatever the content.

Second, the possibility that Congress might allocate law-interpreting power away from an agency if lawmakers decided that the agency's performance was unacceptable would increase the influence of current Congresses over agencies. This in turn might increase the political pressures on agencies, particularly pressures related to current political passions. Moreover, it would increase the influence of the committees responsible for authorization and appropriations bills because they would make the initial decision about delegating law-interpreting authority, and the full House or Senate would be unlikely to revisit the decision in the context of deliberation on a lengthy legislative proposal dealing with many aspects of an agency or with many funding decisions.[95] Of

[95] See J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, __ Tex. L. Rev. __ (forthcoming 2003) (arguing that oversight techniques tend to empower submajorities in

course, these committees already have substantial influence over agencies because of their oversight activities, their control over agency budgets, and other formal and informal tools used to influence administrators.[96] Agencies routinely balance the demands of their competing principals—Congress and the President—within the structure of the regulatory program enacted by yet a third principal, a previous Congress.[97] While my proposal might marginally increase the influence of current lawmakers, particularly those on oversight committees, I do not see it as significant enough to profoundly affect current dynamics.

Third, and relatedly, Congress might decide how to allocate authority between agencies or courts solely on political grounds. For example, a Democratic Congress, angry at the policies pursued by the Environmental Protection Agency under a conservative Republican President, might decide to punish it by instructing courts to pay no special attention to agency views on statutory interpretation. Of course, this objection is no different from accusations that can be leveled at Congress with respect to any delegation of regulatory authority. Political considerations are not illegitimate in this realm; regulatory policy should be based on a mix of technocratic issues and on political perspectives that take account of the wishes of the electorate. Both change over time, and Congress and the executive branch take account of them as they determine regulatory policy.

It is not clear to me why this context poses a greater risk of inappropriate political power plays than other arenas. On the contrary, Congress might feel somewhat more constrained here for several reasons. First, if lawmakers "punished" agencies by taking away law-interpreting power, they would allocate that power to judges who might be less

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Congress that may subvert the objectives of the full body as articulated in statutory commands); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 Duke L.J. 1059, 1075-82 (2001) (discussing effect of congressional oversight when the members of oversight committees have outlying preferences); Jonathan T. Molot, supra note 16, at 1291 (noting that "it is far from clear that the policy preferences of legislative oversight committees accurately reflect the views of the House or Senate as a whole"). See also Jerry L. Mashaw, supra note 56, at 23 (noting that effective agencies already take current political developments into account when making regulatory decisions).

[96] See, e.g., Jessica Korn, The Power of Separation: American Constitutionalism and the Myth of the Legislative Veto (1996) (discussing the various methods of influence Congress and committees can bring to bear on agencies and the executive branch). See also David B. Spence, *Administrative Law and Administrative Policy-Making: Rethinking the Positive Theory of Political Control*, 14 Yale J. on Reg. 407, 432-38 (1997) (discussing limitations of ex post methods of political control over agencies).

[97] See J.R. DeShazo & Jody Freeman, supra note 95; David Epstein & Sharyn O'Halloran, supra note 62.

likely to take account of current congressional preferences and who would still pay some attention to agency views as an extrinsic source of meaning. So the punishment might rebound, leaving Congress reliant on an institution that it influences less effectively than it does the agency and that often trusts agencies as the repositories of expertise more than it trusts the legislature. Second, the use of the authorization process to make the allocation decision would have interesting temporal effects. Re-authorizations occur every few years, sometimes every ten years, so lawmakers would be aware that if they delegated interpretive power to the courts, that decision would likely stay in place for some time, perhaps past the term of the President with which Congress disagreed. Of course, Congress could revisit its decision at any time, but the reason an action-prompting mechanism tied to the reauthorization process is necessary is because Congress does not often act without some internal prod. However, the process would be an evolutive one. No decision would be final because it could be reassessed as the political environment changed, although perhaps not immediately given the timing of the authorization process. Thus, the authorization vehicle would decrease the chance of severe punishment, because the decision would have some durability, but any overreaction that occurred could be reassessed in a different political climate. In short, the charge of "political" decisionmaking is either a claim without much traction in the world of political actors, or a charge that is no more, and perhaps less, worrisome in this particular situation.

Even in cases where Congress delegated law-interpreting authority to an agency, courts would have some independent role to play. First, courts would determine the scope of the delegation and ensure that the agency had not exceeded its authority nor regulated past the jurisdiction Congress granted it.[98] Deference to agency determinations of these issues would be inappropriate because agencies are interested parties, with incentives in some cases to over-reach and in some cases to evade responsibility that clearly had been placed on them. The court's job would be to determine the scope of the congressional delegation, a task made easier with express congressional directives, not to second-guess the agency's decision to regulate particular entities or to deal with problems that arguably

[98] See, e.g., Henry P. Monaghan, supra note 5, at 6 ("Where deference exists, the court must specify the boundaries of agency authority, within which the agency is authorized to fashion authoritatively part, often a large part, of the meaning of the statute.").

come within its mandate. The issue of whether *Chevron* deference can be applied to jurisdictional questions has not been clearly settled by the Court;[99] in my view, ensuring an independent judicial analysis to determine the scope of the delegation is vital to ensure that a relatively impartial entity determines the boundaries of agency authority. Applying this limitation would be somewhat problematic, however. It is sometimes difficult to distinguish between a question that concerns the agency's jurisdiction, which would merit independent assessment by the judiciary, and a question of applying delegated authority to a borderline case, in which deference to the agency's decision would be appropriate either when Congress had signaled that agency views on the meaning of statutes should be controlling or when the judicial default rule would understand congressional silence as such a delegation. One way to resolve the difficulty is to require an independent judicial role only with respect to broad jurisdictional issues that either expand agency power substantially or restrict it significantly.[100]

Second, courts should require that agencies provide reasons for their decisions to exercise their delegated law-interpreting power in a particular way.[101] Not only are explanations important to promote agency accountability and transparency of decisionmaking, but agencies should not be allowed to adopt interpretations of statutes that are clearly erroneous. Only by assessing the analysis that supports a particular interpretation of vague or ambiguous language can the courts discharge their duty under the Administrative Procedure Act to reject agency action that is "arbitrary, capricious, an abuse of discretion, or not in accordance with law."[102] As long as the agency acted within the authority delegated to it by Congress, the court should accept any reasonable

[99] See Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 Cardozo L. Rev. 989, 992-93 (1999) (arguing for independent role for judiciary to determine jurisdictional questions and acknowledging that judicial practice remains unsettled); Cass R. Sunstein, supra note 23, at 446 (arguing that deference to agency is inappropriate in context of question "whether agency jurisdiction extends to new or unforeseen areas"); Cass R. Sunstein, supra note 2, at 2099 ("The principal reason [for an independent judicial role] is that Congress would be unlikely to want agencies to have authority to decide on the extent of their own powers. To accord such power to agencies would be to allow them to be judges in their own cause, in which they are of course susceptible to bias.").

[100] See Cass R. Sunstein, supra note 2, at 2100.

[101] See Jerry L. Mashaw, *Small Things Like Reasons are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 Fordham L. Rev. 17, 26 (2001) ("The path of American administrative law has been the path of the progressive submission of power to reason. The promise of the administrative state was to bring competence to politics.").

[102] Administrative Procedure Act, Section 706(2)(A). See also M. Elizabeth Magill, supra note 33 (discussing similarity of judicial review at Step Two of *Chevron* and arbitrary and capricious review in other contexts).

interpretation supported by an explanation, but it would retain a very limited role to play to take care that the agency did not act irrationally or unreasonably. Perhaps the way to think about this sort of judicial review is to understand it as a method to detect clear mistakes.[103]

In proposing that courts retain a limited role to police the scope of Congress' delegation to agencies, to ensure reasoned explanations, and to guard against clear error, I am aware that courts might use any grant of power to avoid deferring to agencies and to retain primary law-interpreting authority. Particularly in the realm of distinguishing jurisdictional questions from other questions, the dividing line is blurry, and judgment calls are necessary. Aggressive judges could use any exception as an invitation to push the entire judicial camel, nose-first, into the policymaking tent. However, if Congress had expressly directed that agency interpretations of statutory language should be "controlling" or otherwise indicated that courts should defer to agencies, deference might actually occur more than it does now in the world of judicially-constructed rules. In practice, *Chevron* has resulted in less deference than one might have expected, and courts routinely find "clear" statutory meaning at Step One through aggressive use of canons and other interpretative methods. Although judges could still evade congressional directives to defer using similar techniques, they might be less likely to do so in the face of an explicit directive rather than because of one constructed by the courts. Particularly when the doctrinal justification for deference rests on congressional delegation, even the most aggressive judge might find ignoring a clear directive passed pursuant to a procedural framework problematic. Although the concern about judicial opportunism is a real one, it seems more problematic to deny any role to the courts, and such a course might well be constitutionally impermissible given *Marbury* and the structure of separated powers.

[103] The role I envision for the courts here is similar to the role Thayer argued they should undertake with regard to constitutional review of congressional action, with the additional requirement that agencies provide explanations for the interpretations they select. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893). See also Henry P. Monaghan, supra note 5, at 13-14 (discussing Thayer's suggestion of judicial review only for clear error and arguing that such a deferential standard of review might be consistent with *Marbury* if one separates the question of the existence of judicial review from its scope); Nicholas S. Zeppos, supra note 87, at 299 (drawing analogy between *Chevron* deference and Thayerian review).

III. Conclusion

Fundamentally, *Marbury v. Madison* is a case about allocating power among institutions of governance. Thus, as we assess it at its bicentennial, we should use it as a springboard to consider the relationship among modern governance institutions, which include not only Congress and the courts, but also administrative agencies. Under current doctrine, informed by *Marbury* and administrative law precedents like *Chevron*, the role that agencies play in law-interpreting and other matters is largely left to Congress to determine when it delegates authority to the executive branch. In the absence of clear congressional directives, courts have, in the guise of constructing legislative intent, made the decision themselves whether to retain the power to interpret statutes or allocate it mainly to agencies by deferring to reasonable agency interpretations. Whether the judicial approach is couched in terms of congressional intent, or uses some other basis for allocating the power to make policy through interpretation, the judicial approaches all envision that Congress has continuing power to vary any judicial default rule.

Notwithstanding the acceptance of congressional power to override the judiciary with respect to which institution should interpret laws, no one seriously expects Congress to act in most cases. We have accepted the courts' predominant role in this area, in part because of low expectations with regard to legislative performance. However, a procedural framework could be crafted to encourage lawmakers to use regularly enacted legislative vehicles to provide clearer guidance to courts and agencies of their roles with respect to statutory interpretation. If, notwithstanding adoption of such a vehicle, Congress still failed to provide direction, congressional silence would have more meaning, although the meaning would depend on the default rule of judicial review adopted by courts. When Congress remains mute despite the opportunity to instruct clearly, some would argue that the role *Marbury* envisioned for the judiciary would be appropriate even in the context of regulatory statutes. Or courts might adopt and consistently apply a bright-line rule favoring agency interpretation over judicial interpretation, based on technocratic, democratic, or other institutional considerations. In that case, the action-prompting congressional procedure would allow Congress a meaningful opportunity to vary such a default.

My own preference is for the second default rule based on my assessment of the institutional considerations. But the point of this article is not to argue in favor of one or the other default rule, but to present a proposal that makes more meaningful the aspects of judicial review of regulatory statutes that envision a role for Congress. No matter what the judicial default rule, the procedural framework described here would make the possibility of its involvement more salient to Congress, and it would encourage the legislature to consider any variance of the default role in the appropriate context of authorization bills or, when necessary, appropriations bills. Once judicial review is situated in the model of a continuing process of interaction among courts, Congress, and agencies, we can better understand the importance of providing all these groups with the tools they need to communicate with and respond to the other branches.

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